

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**DELOIS G. SHOEMAKER**

Claimant

V.

**STATE OF KANSAS**

Respondent

AND

**STATE SELF-INSURANCE FUND**

Insurance Carrier

Docket Nos. 1,034,302  
& 1,040,911

**ORDER**

Claimant, through Roger Riedmiller, requests review of Administrative Law Judge Ali Marchant's July 9, 2015 Award. Jeffery Brewer appeared for respondent and insurance carrier (respondent). The Board heard oral argument on November 17, 2015, and we have carefully considered the entire record and adopted the Award's stipulations.

**ISSUES**

The appeal involves two separately docketed claims. In Docket No. 1,034,302, in which the parties stipulated to an April 20, 2007 date of accident, claimant alleged repetitive injuries to her back, neck and shoulders. In Docket No. 1,040,911, in which the parties stipulated to a June 18, 2008 date of accident, claimant alleged injuries or aggravations of her back, neck, hip, and legs from slipping and twisting to avoid falling.

The judge found claimant sustained personal injury by accident arising out of and in the course of her employment in both claims, but failed to prove any permanent impairment or disability.

Claimant appeals and argues she proved permanent impairment and disability. She asserts she need not prove functional impairment to obtain a work disability (permanent partial general body disability) award based on *McLaughlin*.<sup>1</sup> Claimant asserts the change in the law on May 15, 2011, which now requires at least a 7.5% whole body impairment to obtain a work disability, proves the law applicable at the time of her injuries did not require proof of permanent impairment to receive a work disability award. Claimant also argues the AMA *Guides*<sup>2</sup> (hereafter *Guides*) fail to account for her chronic pain, such that her impairment may be based on physician judgment and determined outside of the *Guides*.

---

<sup>1</sup> *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348 (1989).

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*. The parties stipulated at oral argument that the Board may consider the *Guides* in deciding this appeal.

Respondent maintains the Award should be affirmed, arguing claimant sustained no permanent injury or impairment. Respondent asserts claimant has a preexisting psychological condition which causes her to subjectively believe pain limits her ability to work. Further, respondent asserts the court-ordered opinions of a neurosurgeon and a psychologist are more credible than that of claimant's hired medical expert.

The issues are: (1) did claimant sustain personal injury arising out of and in the course of her employment, and if so, (2) what is the nature and extent of her disability?

### **FINDINGS OF FACT**

Claimant, currently 60 years old, began working as a corrections officer for respondent at Larned Juvenile Correctional Facility on June 26, 1998. Prior to that time, claimant had workers compensation accidents with other employers in which she injured her neck, shoulders and back. Claimant testified she had a physical before working for respondent and was not having any problems with her back, neck or any other body part at that time. Prior to the injuries asserted in these docketed cases, claimant sustained multiple work-related injuries while working for respondent, involving various body parts, including her back, neck and shoulders. On May 31, 2006, claimant settled a workers compensation claim with respondent for a series of accidental injuries.

Claimant testified she injured her back, neck and shoulders when moving cabinets and furniture while cleaning on February 28, 2007.

On June 12, 2007, at claimant's attorney's request, George Flutter, M.D., who is board certified in physical medicine and rehabilitation, evaluated claimant. Most of Dr. Flutter's examinations are for claimants' attorneys. Like all physicians involved in these claims, Dr. Flutter reviewed medical records, took a history and physically examined claimant. Claimant reported she was injured from lifting plastic chair mats and moving a wheeled receptacle and other items while vacuuming on February 28, 2007, and that cold air blowing directly on her worsened her symptoms. Claimant complained of pain to her neck, upper back, shoulders, arms, knees, feet, left thorax and left thigh. She rated her pain in excess of a 10 on a 0-10 pain scale in which 10 is the most amount of pain.

Dr. Flutter diagnosed claimant with: (1) history of chronic pain; (2) recently diagnosed fibromyalgia; (3) neck/upper back, middle back and lower back pain; (4) cervical, thoracic and lumbar strain/sprain; and (5) bilateral shoulder pain and impingement. Dr. Flutter opined claimant's condition was causally related to her work activities. He stated claimant's prior neck and bilateral shoulder injuries were exacerbated or aggravated by her work activities. Dr. Flutter further noted claimant's chronic pain and fibromyalgia contributed to her symptoms.

Dr. Flutter gave claimant temporary work restrictions and recommended additional treatment, including medications, diagnostic tests, physical therapy, a TENS unit, pain management and a neurosurgical and/or an orthopedic consultation.

On June 17, 2007, claimant mopped up water for seven or eight hours after a fire sprinkler malfunctioned, and on September 25, 2007, claimant stumbled from what she viewed as a defective chair. Claimant indicated both incidents aggravated her injuries.

Pat Do, M.D., a court-appointed neutral physician, evaluated claimant on July 17, 2007. Claimant complained to Dr. Do about pain affecting her neck, shoulders and back which radiated into both legs. She rated her pain as a 10. Apart from the injuries asserted in her two docketed cases, claimant told Dr. Do she had several work-related injuries in the prior several years involving her neck, shoulders, back, knees and feet, which required treatment by several doctors.

Dr. Do diagnosed claimant with neck pain, back pain and myofascial pain syndrome affecting her neck and shoulders. While Dr. Do believed treatment would not eliminate claimant's pain because of her preexisting condition, he recommended physical therapy, medications and injections to try to get her back to her baseline status as it existed before her February 28, 2007 accident. In addressing causation, Dr. Do stated, "It is my medical opinion that within a reasonable degree of medical probability the patient is suffering from a temporary aggravation of a pre-existing condition."<sup>3</sup>

Claimant testified lack of heat in her work area caused her muscles to become stiff on December 28, 2007.

On April 12, 2008, claimant was performing nightly searches when she slipped on some water on the floor and had to do a "ballerina dance to keep from falling."<sup>4</sup> Claimant felt the incident worsened her shoulders, neck and low back.<sup>5</sup> Claimant later testified the April 12, 2008 incident also caused bilateral knee injuries.<sup>6</sup> She also testified this incident injured her hip, back, left knee, shoulders, neck and maybe her right leg.<sup>7</sup>

---

<sup>3</sup> Do Report (filed Aug. 15, 2007) at 5.

<sup>4</sup> P.H. Trans. (Sep. 16, 2008) at 6.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> P.H. Trans. (June 25, 2009) at 8-9.

<sup>7</sup> R.H. Trans. (May 31, 2011) at 19-20.

Dr. Do provided additional treatment. Thereafter, claimant had multiple slips without falling on wet floors while working for respondent, including in August 2008, which she indicated aggravated “all [of her] body parts again.”<sup>8</sup> She also asserted other incidents injured her knees<sup>9</sup> and other body parts.<sup>10</sup> While she never fell, she testified her injuries were aggravated because she had to twist her body to keep from falling.

At claimant’s attorney’s request, Dr. Fluter evaluated claimant a second time on May 12, 2009. Claimant complained of pain affecting her neck, upper back, shoulders, arms, lower back, buttocks, thighs, knees, calves and feet. She rated her pain as above a 10.

Dr. Fluter diagnosed claimant with: (1) status post work-related injuries; April 2008, August 2008 and November 2008; (2) history of chronic pain; (3) history of fibromyalgia; (4) neck/upper back, middle back and lower back pain; (5) cervical, thoracic and lumbar strain/sprain; (6) bilateral shoulder pain and impingement; (7) bilateral lower extremity pain and (8) bilateral knee pain/patellofemoral syndrome. Dr. Fluter imposed work restrictions and again recommended additional treatment. Dr. Fluter attributed claimant’s condition to her reported work-related injuries and stated:

Ms. Shoemaker has a history of various work-related injuries including one that occurred on or about 02/28/07 affecting the shoulders, neck, and back. Several episodes occurred during the course of 2008, resulting in additional symptoms that ultimately led to further diagnostic testing and treatment.<sup>11</sup>

Claimant testified to additional work-related accidents in 2009 as follows:

- May 26, 2009 – slipped on water on the floor, thereby jarring her right leg, back and shoulder;
- November 2, 2009 – injured her right knee while practicing restraint techniques;
- November 30, 2009 – tripped and fell while restraining a juvenile, injuring her back, knees, legs, neck, shoulders, wrist and left and right sides.

---

<sup>8</sup> P.H. Trans. (June 25, 2009) at 8-9, 13, 17. Claimant also testified the August 20, 2008 incident caused her to have low back, bilateral hip, bilateral shoulder, neck, right leg and leg injuries or aggravations. R.H. Trans. (May 31, 2011) at 20-21.

<sup>9</sup> P.H. Trans. (June 25, 2009) at 17-21 (slips on November 26, 2008 and May 26, 2009).

<sup>10</sup> R.H. Trans. (May 31, 2011), Ex. 1 at 3 (slips on or between October 24, 2008 and November 26, 2008 affecting her right leg and shoulders)

<sup>11</sup> Fluter Depo., Ex. 3 at 5.

At claimant's attorney's request, Dr. Fluter evaluated claimant a third time on March 3, 2010. Claimant complained of pain affecting her neck, upper back, shoulders, left elbow, left hand, low back, buttocks, thighs and knees. She rated her pain as an 8, with it being a 5-6 on good days and over a 10 on bad days.

Dr. Fluter diagnosed claimant with: (1) status post work-related injury affecting her right lower extremity, hip, back, left knee, shoulder, neck (04/12/08); (2) history of chronic persistent pain; (3) history of fibromyalgia; (4) neck, upper back, middle back and lower back pain; (5) cervical, thoracic and lumbar strain/sprain; (6) bilateral shoulder pain and impingement; (7) bilateral lower extremity pain; (8) bilateral knee pain and patellofemoral syndrome; and (9) bilateral trochanteric bursitis. Dr. Fluter attributed claimant's condition to her work, stating her prior neck and bilateral shoulder injuries were aggravated by her work and noting her chronic pain and fibromyalgia contributed to her symptoms.

Dr. Fluter gave claimant permanent restrictions essentially limiting her to light duty work and avoidance or limitation of certain postures and movements. Dr. Fluter indicated claimant's condition would worsen if she worked without restrictions and respondent did not have claimant working restricted duty.

Using the *Guides*, Dr. Fluter, in his report, assigned claimant a combined whole body impairment of 18% consisting of:

- 10% to the right lower extremity (4% whole body) and 10% to the left lower extremity (4% whole body) for mild knee range of motion deficits;
- 7% to the right lower extremity (3% whole body) and 7% to the left lower extremity (3% whole body) for trochanteric bursitis with abnormal gait;
- 2% whole body to the cervicothoracic spine for myofascial pain; and
- 2% whole body to the lumbosacral spine for myofascial pain.

Differing from his report, Dr. Fluter testified claimant's combined whole body impairment using the *Guides* would be 19% as follows:

- 5% whole body to the cervicothoracic spine for myofascial pain;
- 5% whole body to the lumbosacral spine for myofascial pain;
- 9% to the right upper extremity at the level of the shoulder for range of motion deficits; and
- 11% to the left upper extremity at the level of the shoulder for range of motion deficits.

Dr. Fluter testified claimant did not have a preexisting impairment for myofascial pain. Dr. Fluter stated the impairment he assigned claimant was attributable to her February 2007 accident and her continuing work thereafter. He also testified he did not know if claimant qualified for a 5% impairment of function under the *Guides'* DRE Category II for the cervicothoracic or lumbosacral spine prior to February 28, 2007.

Dr. Fluter testified claimant reported living with chronic pain since 2003 and reported her pain as being an 8 and sometimes in excess of a 10 at each visit. Dr. Fluter stated chronic pain syndrome is a "long-time condition" with the individual experiencing various degrees of pain which will often wax and wane throughout life.<sup>12</sup> Dr. Fluter testified claimant's work injuries permanently aggravated her chronic pain condition.<sup>13</sup>

Paul Stein, M.D., a court-appointed neutral physician, evaluated claimant on July 29, 2010. Claimant complained of pain affecting her neck, shoulders, lower back, hips and lower extremities. She described her pain as ranging from a 4 or 5 to over a 10. Claimant reported taking Elavil for fibromyalgia and sometimes ibuprofen or over-the-counter acetaminophen for pain. Dr. Stein noted claimant had multiple prior work-related injuries affecting her neck, upper back, lower back, shoulders and lower extremities. On physical examination, Dr. Stein found no guarding, focal point tenderness or spasm to document true soft tissue or myofascial pain. Dr. Stein testified:

I noted that she would frequently keep her eyes closed or half closed; that she somewhat seemed somewhat distant; and her affect, that is her emotions on her face, was somewhat flat. All of those things led me to wonder or be concerned about the possibility of depression. She walked slowly and stiffly but she did not have a limp. She manifested some decrease in range of motion of her neck and her lower back. She manifested just a mild restriction of range of motion of the shoulders although she complained of pain quite a bit during that activity. She reported some tenderness to palpation in various areas of her neck, upper and lower back but I found no guarding. There was also tenderness reported in some of the fibromyalgia locations but I didn't feel that I found enough of them to make a definitive diagnosis of fibromyalgia as defined by the American College of Rheumatology if you accept that definition. The remainder of the examination was negative.<sup>14</sup>

Dr. Stein diagnosed claimant with chronic pain syndrome because he could not find the appropriate trigger points for fibromyalgia. Dr. Stein testified he was unable to document any structural pathology or injury to adequately explain the intensity of claimant's pain or limitations. He believed claimant's pain was more psychologically based.

---

<sup>12</sup> *Id.* at 69, 73-74.

<sup>13</sup> *Id.* at 40.

<sup>14</sup> Stein Depo. at 10-11.

Dr. Stein stated claimant's complaints preexisted 2007. He agreed claimant's incidents at work on and after February 28, 2007, contributed to her chronic pain syndrome, but he had no objective basis to say her work injuries caused permanent aggravation. Dr. Stein agreed claimant believes her condition worsened, and he could not confirm or dispute her belief.<sup>15</sup> Dr. Stein did not find claimant to be malingering or dishonest, but he could not describe her as credible because even though claimant believed her pain complaints, he did not think she was as injured as she contended.<sup>16</sup>

In addressing causation, Dr. Stein stated:

Ms. Shoemaker has had widespread pain essentially throughout the body for many years with multiple episodes of apparent exacerbation. Multiple investigative studies such as spinal MRI scans, shoulder and knee MRI scans, and a cervical myelogram/CT scan have shown only age and weight related mild degenerative change with no diagnostic findings to explain the symptoms. While there may be some mild areas of tendonitis, for the most part she manifests a chronic pain syndrome without evidence of specific underlying injury. Whether one wishes to call this fibromyalgia or simply a chronic pain syndrome makes relatively little difference in regard to treatment and impairment. The basic situation with such diagnoses is widespread complaint of pain without underlying structural pathology demonstrated. In this instance, there is also likely an element of depression with some underlying emotional dysfunction resulting in at least part of the physical complaints. This is also not uncommon in patients with fibromyalgia/chronic pain syndrome and is not a result of work-related injuries.<sup>17</sup>

Dr. Stein, while noting the *Guides* allow a rating to be based on subjective complaints, assigned claimant a 0% impairment pursuant to the *Guides*.<sup>18</sup> He opined claimant does not need any permanent restrictions because she lacks any structural or anatomic pathology. While Chapter 15 of the *Guides* allow for impairment for chronic pain syndrome when accompanied by musculoskeletal system impairment, Dr. Stein quoted the *Guides*: "An individual who complains of constant pain but who has no objectively validated limitations in daily activities has no impairment."<sup>19</sup> The doctor noted other chapters of the *Guides* better account for physical impairment and he expressed some concern about the subjective nature of pain.<sup>20</sup>

---

<sup>15</sup> *Id.* at 48-50.

<sup>16</sup> *Id.* at 9; see also p. 44.

<sup>17</sup> *Id.*, Ex. 2 at 9.

<sup>18</sup> *Id.* at 80-81.

<sup>19</sup> *Id.* at 37.

<sup>20</sup> *Id.* at 28-34.

When questioned regarding claimant's impairment if the *Guides* were not used, Dr. Stein testified:

[W]ith no consideration to etiology or origin of the pain and taking purely Ms. Shoemaker's statements regarding her pain and her ability to function and going outside of any reference material, what I would be able to say is that she is severely impaired or believes she is severely impaired. I can't put a percentage to it because I have no framework personally. But I would say if we were comparing it to let's say some of the objective spinal categories in the guides I would have to put it up as high as 30 or 40 percent or more. But purely within the framework that you have established for me.<sup>21</sup>

On January 24, 2011, claimant left respondent's employment. She testified she could no longer fulfill her job duties. She stated she complained the work environment was too cold (as low as 50° F) and sometimes too hot (around 100° F). She believed the work temperature was somehow causative with her "body breaking down" and respondent was trying to "[kick her] out because they would not adjust the heat."<sup>22</sup> Claimant would have been comfortable at 68-70° F. Dr. Stein noted claimant's asserted exposure to cold or hot temperatures at respondent would not permanently injure her.

Paul S. Hardin, a vocational consultant, interviewed claimant on April 11, 2011, at claimant's attorney's request. Mr. Hardin completed a task list with 38 non-duplicated tasks. Dr. Fluter reviewed the task list generated by Mr. Hardin and opined claimant could no longer perform 19 of the 38 non-duplicated tasks for a 50% task loss. Dr. Stein testified claimant is capable of performing all the listed tasks on a physical basis because he could not identify any objective pathology or injury, but psychologically, she believes she is incapable of doing any of those activities because of pain. Dr. Stein opined claimant, based on her pain, but without regard to any permanent restrictions, could no longer perform 28 tasks, for a 73.6% task loss.

Steve L. Benjamin, a vocational consultant, interviewed claimant on September 30, 2011, at respondent's attorney's request. Mr. Benjamin completed a task list consisting of 46 non-duplicated tasks. Mr. Benjamin indicated claimant held two post-injury jobs, but did not earn any wages after September 19, 2011.

Marc Quillen, Ph.D., a licensed clinical psychologist, performed a court-ordered and neutral psychological evaluation of claimant on March 27, 2013. He could only recall testifying in one other workers compensation case. In unrelated brain injury litigation, Dr. Quillen estimated about 30% of his referrals are for plaintiffs and 70% are for defendants or insurance companies.

---

<sup>21</sup> *Id.* at 44.

<sup>22</sup> R.H. Trans. (May 31, 2011) at 45.



Claimant told Dr. Quillen about a long history of depression that worsened after her onset of chronic pain. Claimant reported marked anhedonia (inability to experience pleasure from activities usually found enjoyable), feelings of guilt and worthlessness, low energy, reduced concentration, reduced appetite and psychomotor retardation (slowing-down of thought and a reduction of physical movements). Claimant told Dr. Quillen her pain contributes to her depression because “she cannot be active due to the pain, and this makes controlling the depression more difficult.”<sup>23</sup>

Dr. Quillen administered psychological/personality tests which revealed a pattern of over-reporting, thus making the tests invalid and unreliable. Still, Dr. Quillen testified there was no indication claimant was malingering or intentionally feigning pain. Dr. Quillen diagnosed claimant with recurrent and moderate major depressive disorder. In addressing causation, Dr. Quillen stated:

The issue of a connection between the pain and the depression is straightforward in its expression, but not in its etiology. There is no question that depression exacerbates pain and pain exacerbates depression, in general and in Ms. Shoemaker in particular. However, the necessary etiological link in which the work injury caused the pain which caused the depression or the work injury caused the depression which caused the pain is not present in Ms. Shoemaker. These present as parallel issues in which there is depression and there is pain, which may exacerbate each other, but which are not causally linked both to the work injury and Ms. Shoemaker’s reported disability. Absent this link, especially in the presence of the longstanding mood disorder and other psychological issues in Ms. Shoemaker, there is no clear indication of a psychological issue related to the work injury which impacts Ms. Shoemaker’s current functioning.<sup>24</sup>

Dr. Quillen testified claimant had many symptoms of depression. Dr. Quillen testified claimant “reported the pattern of, among other things, anhedonia as being similar or the same currently as they have been in the past.”<sup>25</sup> Dr. Quillen stated claimant “has a major depressive disorder (and other psychological issues) which are not caused by the work injuries or pain. Although the pain and depression may exacerbate each other, this exacerbation is not etiologically linked to the work injuries.”<sup>26</sup> Dr. Quillen testified claimant’s depression predated her reported work injuries and indicated when he evaluated her, it was at a level consistent with her long-term baseline and her work injuries did not worsen her preexisting depression.

---

<sup>23</sup> Quillen Depo., Ex. 1 at 6.

<sup>24</sup> *Id.*, Ex. 1 at 8.

<sup>25</sup> *Id.* at 25.

<sup>26</sup> *Id.*, Ex. 1 at 8.

Dr. Quillen indicated chronic pain syndrome is not a psychological diagnosis, so he would not dispute Dr. Stein's conclusion regarding claimant's pain. Dr. Quillen acknowledged claimant's pain is a contributing factor in her depression. However, he opined claimant did not suffer a pain disorder caused by psychological factors. He stated such diagnosis requires psychological factors to be a major role in the onset, severity and exacerbation or maintenance of the pain, and such condition was not met. Dr. Quillen testified claimant's psychological factors were independent of her pain or coexisting with the pain, but were not causing her pain or exacerbating or maintaining her pain. He stated claimant would have the same level of depression whether or not pain was present. It was Dr. Quillen's opinion claimant was not malingering or faking, nor did he suspect secondary gain. He opined claimant had a 0% rating for psychological conditions because she had no psychological or psychiatric injury.

When questioned whether the chronic pain syndrome exacerbated claimant's depression, Dr. Quillen testified:

My opinion is, as I stated earlier, that an individual with chronic pain or with pain, there's going to be exacerbation of depression. And that is occurring in Ms. Shoemaker. Having said that, Ms. Shoemaker also experiences cycles of significant depression throughout her life by her own report which again by her report look to be similar to the current cycles of depression that she is having. So one could argue and my opinion is that Ms. Shoemaker would have the cycles of depression that she is having and would have the same response of medication to those cycles of depression whether the pain was present or not.<sup>27</sup>

Claimant testified her back and neck pain remained unchanged after February 28, 2007, but she has increased right shoulder pain and now has numbness in her arms. Her right leg has a stabbing, tingling pain and buckles, and her left leg has a stabbing, shooting pain, with pins and needles and numbness. Additionally, she testified her pain worsened after April 12, 2008. She reported numbness in her hand and fingers, left shoulder pain and numbness and radiation in her foot. Claimant testified she told Dr. Stein she had muscle spasms from her low back to her trapezius area. She acknowledged having such symptoms in connection with a 1993 workers compensation case while working for a prior employer, but testified such prior symptoms resolved after one or two months.

In deciding the cases, the judge stated claimant sustained injuries arising out of and in the course of her employment in both docketed claims. However, the judge found:

Two physicians and one psychologist provided opinions in this case regarding the nature and extent of Claimant's permanent impairment related to her work injuries. Claimant hired Dr. Flutter, who admittedly does "essentially all" of his medical legal evaluations at the request of workers compensation claimants, to provide his opinions regarding the nature and extent of Claimant's impairment and

---

<sup>27</sup> *Id.* at 20.

disability. (Fluter Depo., p. 10). Dr. Fluter testified that Claimant had impairment to both shoulders for a loss of range of motion as well as impairment to both the cervicothoracic and lumbosacral spine for myofascial pain. Dr. Fluter assigned Claimant a combined total of 19% to the body as a whole as a result of her work-related injuries. Dr. Fluter believed that Claimant's work accidents aggravated her pre-existing conditions; however, Dr. Fluter was unable to say whether Claimant had any impairment that pre-dated her work accidents. Dr. Fluter assigned permanent work restrictions and opined that Claimant has a 50% task loss under his restrictions as a result of her work injuries.

Dr. Stein provided his opinions regarding the nature and extent of Claimant's impairment at the request of the Court. Dr. Stein did not believe that Claimant sustained any permanent impairment as a result of her work accidents. Rather, Dr. Stein diagnosed Claimant with chronic pain syndrome, stating that Claimant had chronic pain without evidence of a specific underlying injury. He was unable to say within a reasonable degree of medical probability that Claimant's chronic pain syndrome was permanently aggravated as a result of her work injuries. Additionally, Dr. Stein commented that even if he found Claimant had any permanent impairment related to her work accidents, it would not be any more than the DRE Category II impairment Claimant was previously assigned as part of her prior unrelated workers compensation claim. Dr. Stein also declined to assign any permanent work restrictions as he did not find a physical basis for imposing restrictions. As such, Dr. Stein opined that Claimant has no task loss as a result of her work injuries.

Dr. Stein recommended Claimant undergo a psychological evaluation related to her chronic pain syndrome. Dr. Quillen was the Court-ordered independent psychological examiner who evaluated Claimant. He diagnosed Claimant with major depressive disorder that he believed pre-existed her work accidents and had returned to a level consistent with her long-term baseline at the time of his examination. Dr. Quillen did not believe that Claimant had any psychological impairment related to her work accidents and did not impose any work restrictions related to her work accidents.

The Court adopts the opinions of its independent medical examiners, Dr. Stein and Dr. Quillen. As the Court-ordered independent medical examiners, Dr. Stein and Dr. Quillen offer a more credible opinion than Dr. Fluter, an admitted Claimant's expert, who was hired by Claimant to render his opinion. Their opinions are also supported by the opinions of Dr. Do, who performed a Court-ordered independent medical examination earlier in the course of litigation and opined that Claimant had sustained a temporary aggravation of her pre-existing condition. As a result, the Court finds that Claimant did not meet her burden to prove that she sustained any permanent impairment or disability as a result of her April 20, 2007, work accident . . . [or] any permanent impairment or disability as a result of her June 18, 2008, work accident.<sup>28</sup>

---

<sup>28</sup> ALJ Award at 12-13.

PRINCIPLES OF LAW

K.S.A. 2006 and 2007 Supp. 44-501(a) state an employer is liable to pay compensation to an employee for personal injury by accident arising out of and in the course of employment. Whether an accident arises out of and in the course of employment is fact dependent.<sup>29</sup> An accidental injury is compensable even where the accident only aggravates or accelerates a preexisting condition.<sup>30</sup> The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must be proven before compensation is allowed. Claimant has the burden to prove the right to an award using a "more probably true than not true" standard based on the whole record.<sup>31</sup>

K.S.A. 44-510e(a) allows an award for permanent partial general disability when an employee is disabled in a manner which is partial in character and permanent in quality. K.S.A. 44-510e(a) states functional impairment is to be based on the *Guides* if the impairment is contained therein. If a claimant's impairment is not covered in the *Guides*, a doctor may use his own judgment to assess a claimant's impairment.<sup>32</sup>

Based on K.S.A. 2006 and 2007 Supp. 44-555c(a), the Board has exclusive jurisdiction to review all decisions, findings, orders and awards of a judge under the Kansas Workers Compensation Act. Board review of a judge's order is de novo on the record.<sup>33</sup> The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.<sup>34</sup> The Board, on de novo review, makes its own factual findings.<sup>35</sup> From July 1, 1993 forward, the Board assumed the de novo review of the district court.<sup>36</sup> "It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."<sup>37</sup>

---

<sup>29</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995). The phrases "arising out of" and "in the course of" employment have been judicially interpreted and need not be repeated. *Id.*

<sup>30</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 514, 949 P.2d 1149 (1997).

<sup>31</sup> K.S.A. 2006 and 2007 Supp. 44-501(a) and K.S.A. 2006 and 2007 Supp. 44-508(g).

<sup>32</sup> See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 2009 WL 596551 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010.

<sup>33</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>34</sup> See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

<sup>35</sup> See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

<sup>36</sup> See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

<sup>37</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

ANALYSIS

**1. Claimant sustained personal injury by accident arising out of and in the course of her employment for both docketed cases.**

Claimant sustained personal injury by accident arising out of and in the course of employment in both docketed cases. There is no evidence to contravene her testimony.

**2. Claimant did not prove she sustained permanent impairment in either case. She is not entitled to permanent partial disability benefits.**

For the reasons stated in the underlying Award, the Board agrees with the judge's conclusion that claimant did not prove permanent impairment of function or work disability. We agree the opinion of the court-ordered physician, Dr. Stein, is more credible than the opinion of claimant's hired expert, Dr. Fluter. We see no error in the judge adopting Dr. Quillen's psychological opinion that claimant did not prove a permanent psychological injury or impairment due to her work injuries.<sup>38</sup> Also, Dr. Do, a court-ordered physician, indicated claimant only had a temporary aggravation of a preexisting condition. K.S.A. 44-516 states the report of a court-ordered health care provider "shall be considered by the administrative law judge in making the final determination."<sup>39</sup>

Claimant has multiple arguments why she should receive permanent partial disability benefits for functional impairment and a work disability award.

Claimant's argument that *McLaughlin*<sup>40</sup> allows a work disability without proof of permanent impairment is rejected. K.S.A. 44-510e(a), by its plain language, requires a claimant to prove his or her disability is both partial and permanent. In *Hart*,<sup>41</sup> the Board denied work disability benefits because claimant had no permanent impairment. The Kansas Court of Appeals affirmed, stating, "[T]he language of K.S.A. 44-510e(a) necessarily precludes a finding that claimant is entitled to work disability under this circumstance."<sup>42</sup>

---

<sup>38</sup> Claimant did not allege a psychological impairment or disability as a result of her accidental injuries.

<sup>39</sup> See *Alaniz v. Dillon Companies, Inc.*, No. 109,784, 2014 WL 3731939 (Kansas Court of Appeals unpublished opinion filed July 25, 2014).

<sup>40</sup> *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348 (1989).

<sup>41</sup> *Hart v. Bott Family Farms*, No. 99,895, 2009 WL 1140274 (Kansas Court of Appeals unpublished opinion filed April 24, 2009), *rev. denied* 290 Kan. 1093 (2010).

<sup>42</sup> *Hart*, *supra*. See also *Blaskowski v. Cheney Door Co.*, No. 106,899, 2012 WL 4795580 (Kansas Court of Appeals unpublished opinion filed Oct. 5, 2012), *rev. denied* 297 Kan. 1243 (2013); *Abdi v. Tyson Fresh Meats, Inc.*, No. 104,132, 2011 WL 3444330 (Kansas Court of Appeals unpublished opinion filed Aug. 5, 2011); and *Stout v. Johnson County*, No. 109,439, 2013 WL 5975973 (Kansas Court of Appeals unpublished opinion filed Nov. 8, 2013), *rev. denied* 300 Kan. \_\_\_\_ (August 28, 2014).

Claimant also argues the law applicable at the time of her injuries allowed a work disability award absent a finding of permanent impairment because amendments to the Kansas Workers Compensation Act made effective May 15, 2011, established a threshold of at least a 7.5% whole body impairment for work disability, whereas prior law contained no threshold. However, *Hart* and cases listed above indicate K.S.A. 44-510e requires a threshold finding of permanent impairment before an award of work disability is permitted.

Claimant argues the *Guides* fail to account for her chronic pain. The *Guides* observe: (1) pain is subjective and immeasurable, often viewed with “suspicion and disbelief”<sup>43</sup> and (2) the concept of impairment due to pain is “problematic as well as controversial.”<sup>44</sup> Nonetheless, the *Guides* recognize pain can be an impairment as based on “the physician’s training, experience, skill, . . . thoroughness [and] judgment.”<sup>45</sup>

The *Guides* do account for claimant’s potential impairments, including chronic pain. In general, tables and figures listing impairments in the *Guides* applicable to various organ systems already account for pain.<sup>46</sup> The *Guides* state, “In some instances, an impairment percent applicable to the patient’s pain may be determined, if the condition causing the pain can itself be evaluated according to the criteria applicable to a particular organ system as with example 3 (p. 313).”<sup>47</sup> Such example shows that a person with pain due to a nerve injury should be rated using the chapter concerning the nervous system. In claimant’s case, the court-ordered physician, Dr. Stein, indicated he had no anatomic basis to find an underlying physical injury, leaving only claimant’s subjective complaints of pain. While Dr. Stein believed claimant had pain, he did not assign her any impairment under the *Guides*.

Based on a preponderance of the credible evidence, claimant did not prove any permanent impairment of function due to her injuries. She is not entitled to permanent partial disability benefits for functional impairment or a work disability.

### CONCLUSIONS

(1) Claimant sustained personal injury by accident arising out of and in the course of her employment in both docketed cases.

(2) Claimant did not prove any functional impairment as a result of her accidental injuries in either docketed case. She is not entitled to a work disability award.

---

<sup>43</sup> *Guides* at 303.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 304.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 310.

**AWARD**

**WHEREFORE**, the Board affirms the July 9, 2015 Awards.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2015.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

ec: Roger Riedmiller  
firm@raresq.com

Jeffery Brewer  
jbrewer@jbrewerlegal.com  
jlyons@jbrewerlegal.com  
mbutterfield@jbrewerlegal.com

Honorable Ali Marchant